No. 98-450

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IN THE

Supreme Court of the United States

OCTOBER TERM 1998

MARTIN CROMARTIE, *et al.*,

Appellants,

v.

JAMES B. HUNT, JR., *et al.*,

Appellees,

and

ALFRED SMALLWOOD, *et al.*,

Appellee-Intervenors.

On Appeal from the United States District Court
Eastern District of North Carolina

MOTION TO AFFIRM OR, IN THE ALTERNATIVE, TO DISMISS, OF APPELLEE-INTERVENORS

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. In as much as Appellants did not raise the issue before the three-judge district court below, is Appellants' claim that the court should have placed on the State the burden of proving that race did not predominate in the creation of the 1998 remedial reapportionment plan, which the legislature enacted to cure the constitutional violation found by the district court, in an earlier plan, properly before this Court?

2. Assuming that claim is properly before this Court, did the district court err by placing on the plaintiffs the burden of proving that race predominated in the creation of the remedial apportionment plan enacted by the legislature to cure the constitutional violation found by the three-judge district court in the 1997 congressional reapportionment plan?

3. Without regard to the burden of proof, did the district court err in concluding that the 1998 remedial plan -- enacted by the North Carolina General Assembly to cure the specific constitutional violation that the court found to exist in North Carolina's 1997 congressional reapportionment plan -- was constitutional?

TABLE OF CONTENTS

Page

Counter Statement of Questions Presented i

Table of Authorities iii

Statement of Facts 1

Summary of Argument 5

ARGUMENT –

I. Appellants' Burden of Proof Argument does not warrant this Court's Review 7

A. Appellants failed to raise their burden of proof before the three-judge district court and have, therefore, waived it 7

B. Even if Appellants have preserved the issue, their claim is insubstantial 8

II. Appellants cannot demonstrate that the District Court's Factual Finding that Race did not Predominate in the Creation of the 1998 Interim Remedial Plan was Clearly Erroneous 12

Conclusion 21

TABLE OF AUTHORITIES

CASES

Page

Board of Education v. Dowell,
498 U.S. 237 (1991) 10, 18

Berkemer v. McCarty,
468 U.S. 420 (1984) 8

Breininger v. Sheet Metal Workers,
493 U.S. 67 (1989) 8

Brown v. Board of Education,
347 U.S. 483 (1954) ..... *passim*

Burns v. Richardson,
384 U.S. 73 (1966) 17

Bush v. Vera,
517 U.S. 952 (1996) ..... *passim*

Columbus Board of Education v. Penick,
443 U.S. 449 (1979) 10

Davis v. United States,
495 U.S. 472 (1990) 8

Delta Airlines v. August,
450 U.S. 346 (1981) 8

Freeman v. Pitts,
503 U.S. 467 (1992) 18

CASES (continued)

Page

Green v. County School Board of New Kent County,
391 U.S. 430 (1968) 11

Growe v. Emison,
507 U.S. 25 (1993) 17

Keyes v. School District No. 1, Denver,
413 U.S. 189 (1979) 10

Lawyer v. Department of Justice,
521 U.S. 567 (1997) 9, 15

Miller v. Johnson,
515 U.S. 900 (1995) ..... *passim*

Milliken v. Bradley,
433 U.S. 267 (1977) 17, 19

Missouri v. Jenkins,
515 U.S. 70 (1995) 17

Nix v. Williams,
467 U.S. 431 (1984) 10

Scott v. United States,
920 F. Supp. 1248 (M.D. Fla. 1996),
aff'd sub. nom., Lawyer v. Department of Justice, 521 U.S. 567 (1997) 9

Shaw v. Hunt,
517 U.S. 899 (1996) ..... *passim*

CASES (continued)

Page

Shaw v. Reno,
509 U.S. 630 (1993) ..... *passim*

Solorio v. United States,
483 U.S. 435 (1987) 8

Swann v. Charlotte-Mecklenburg Board of Education,
402 U.S. 1 (1971) 10, 11, 18

Thornburg v. Gingles,
478 U.S. 30 (1986) 11, 12

United States v. Hays,
515 U.S. 737 (1995) 14

Vera v. Richards,
861 F. Supp. 1304 (S.D. Tex. 1994),
aff'd sub. nom., Bush v. Vera,
517 U.S. 952 (1996) 11

Village of Arlington Heights v. Metropolitan Dev. Corp.,
429 U.S. 252 (1977) 12, 13, 15

Voinovich v. Quilter,
507 U.S. 146 (1993) 16, 17

White v. Weiser,
412 U.S. 783 (1973) 16

Wise v. Lipscomb,
437 U.S. 535 (1978) 17

STATUTES & RULES

Page

42 U.S.C. § 1973c 4

1998 N.C. Sess. Laws, Ch. 2 1

Fed. R. Civ. P. 52(a) 12

S. Ct. R. 18.2 1

S. Ct. R. 18.6 1

MOTION TO AFFIRM OR, IN THE ALTERNATIVE, TO DISMISS, OF APPELLEE-INTERVENORS

Pursuant to Rule 18.6 of the Rules of the Supreme Court of the United States, Appellee-Intervenors Alfred Smallwood, David Moore, William M. Hodges, Robert L. Davis, Jr., Jan Valder, Barney Offerman, Virginia Newell, Charles Lambeth and George Simkins ("Smallwood Appellees" or "Appellee-Intervenors")[1] move that this Court summarily affirm the order sought to be reviewed[2] or, in the alternative, dismiss the appeal on the ground that the questions raised by the appeal are so insubstantial as to require no further argument. The order on appeal is based on well-settled law established by this Court, and there is no conflict which requires this Court's resolution.

STATEMENT OF FACTS

This is an appeal of the Order of the three-judge United States District Court for the Eastern District of North Carolina, entered June 22, 1998, in *Cromartie v. Hunt*, approving North Carolina's 1998 interim congressional reapportionment plan, 1998 N.C. Sess. Laws, Ch. 2 ("1998 Interim Remedial Plan"), as a remedy for the specific constitutional violations it found to exist in the State's 1997 plan, as set forth in its April 3, 1998 Order and April 14, 1998 decision. The April Order and decision are unreported and appear at the Appendix to the Jurisdictional Statement on Behalf of the State of North Carolina in *Hunt v. Cromartie*, No. 98-85 ("NC. J.S. App.") at

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[1]Smallwood Appellees were granted intervention as party-defendants by the court below on June 20, 1998, two days prior to the entry of the Order from which this appeal is sought to be prosecuted. They are, accordingly, proper Appellees in this Court. S. Ct. R. 18.2.

[2]The Order of the three-judge United States District Court for the Eastern District of North Carolina, dated June 22, 1998, is unreported and appears in the Appendix to *Cromartie v. Hunt* Appellants' Jurisdictional Statement ("Appellants J.S. App.") at 1a.

45a and 1a, respectively.[3] The April 1998 Order is the subject of a separate appeal currently pending before this Court, *Hunt v. Cromartie*, No. 98-85.

On July 3, 1996, following the ruling of this Court in *Shaw v. Hunt*, 517 U.S. 899 (1996), three residents of Tarboro, North Carolina, who are among the Appellants herein, filed the complaint in this action, *Cromartie v. Hunt*, challenging District 1 of North Carolina's 1992 congressional apportionment plan on the ground that it violated their equal protection rights because race predominated in the drawing of the district. On July 11, 1996, the members of the Smallwood Appellees group (three voters from the First District and six voters from the Twelfth District), sought to intervene in the *Cromartie* suit as defendants.[4]

A stay of the *Cromartie* litigation was entered pending completion of the remand proceedings in *Shaw v. Hunt*. On July 9, 1996 the same Tarboro residents who initiated the *Cromartie* suit joined with the original plaintiffs in *Shaw* in filing an Amended Complaint in *Shaw*, raising a similar challenge to, and asserting the same claims against the First Congressional District as they raised in *Cromartie*. The *Shaw* case was dismissed by the three-judge court on September 12, 1997, after that court approved the 1997 Remedial Plan that had been enacted by the legislature. The *Cromartie* three-judge court lifted its stay of proceedings on October 17, 1997. On the same

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[3] A complete recitation of the relevant facts may be found in the Statement of the Case in the Brief of Appellant-Intervenors filed in *Hunt v. Cromartie*, No. 98-85.

[4] The Smallwood Appellees participated fully as intervenors in *Shaw v. Hunt* in the trial court and in this Court, including in the remedial proceedings which resulted in the approval by the *Shaw* court of the 1997 Remedial Plan.

day, two of the three original plaintiffs, along with four residents of the redrawn District 12, filed an Amended Complaint in the *Cromartie* action, challenging the 1997 Remedial Plan as a violation of the Equal Protection Clause and still seeking a declaration that District 1 in the 1992 Plan is unconstitutional. Within the time allowed for answering that amended complaint, the Smallwood Appellees filed a renewed motion to intervene as defendants.

On March 31, 1998, the court below heard arguments on cross-motions for summary judgment and on the *Cromartie* plaintiffs' request for preliminary injunction. On April 3, 1998, that three-judge United States District Court for the Eastern District of North Carolina issued an order granting summary judgment to plaintiffs, declaring North Carolina's Twelfth Congressional District unconstitutional, permanently enjoining elections under the 1997 Remedial Plan, and ordering the State of North Carolina to submit a schedule for the General Assembly to adopt a new redistricting plan and to hold elections under that plan. NC. J.S. App. at 45a. The district court issued its judgment on April 6, 1998. NC. J.S. App. at 49a.

The State moved for a stay of the injunction pending appeal. The district court denied this motion. The State then filed an application with this Court for a stay pending appeal, and the Smallwood Appellees filed an *amicus curiae* memorandum in this Court in support of the application. This Court denied the request for a stay on April 13, 1998. On April 14, 1998, the district court issued an opinion explaining its April 3, 1998 order.[5]

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[5]On May 26, 1998, with their two prior unopposed intervention motions still pending, the Smallwood Appellees filed a third motion to intervene as defendants in the case. On June 20, 1998, after the deadline for filing a timely notice of appeal of the district court's April 3, 1998 order and April 6, 1998 judgment, the district court ruled that the Smallwood

The district court directed the General Assembly to redraw the State congressional reapportionment plan within thirty days to remedy the violations found by the court in the 1997 Remedial Plan. On May 21, 1998, the General Assembly enacted the 1998 Interim Remedial Plan, and subsequently submitted it to the district court for approval together with documentary evidence describing the legislature's goals and method of producing the plan. Plaintiff-appellants filed an opposition and objections to the 1998 Interim Remedial Plan with the court and the State filed a response. Plaintiff-appellants did not request a court hearing on the plan. Pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, the Department of Justice precleared the 1998 Interim Plan on June 8, 1998.

On June 22, 1998, the district court entered an order tentatively approving the 1998 Interim Remedial Plan and authorizing the State to proceed with the rescheduled 1998 elections under that plan. Appellants J.S. App. at 1a. The district court noted its duty under this Court's precedents to afford the State the first opportunity to cure the constitutional violation found by the court and acknowledged the limits this Court has placed on district courts in evaluating remedial reapportionment plans. Appellants J.S. App. at 3a. Accordingly, the district court determined that "[b]ecause [it] held only that District 12 in the 1997 plan unconstitutionally used race as the predominant factor in drawing District 12, the

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Appellees were entitled to intervene as of right in this action. As the delay in granting the motions to intervene prevented them from fully participating as parties in the district court and prevented them from being able to exercise their right to appeal, the Smallwood Appellees filed in this Court on October 2, 1998 a motion to intervene as Appellants in *Hunt v. Cromartie*, No. 98-85. This Court granted the motion on October 19, 1998. Appellants filed briefs on the merits in No. 98-85 on November 10, 1998.

[c]ourt is now limited to deciding whether race was the predominant factor in the redrawing of District 12 in the 1998 plan." *Id.* The district court found that, in enacting the 1998 Interim Remedial Plan, the General Assembly sought to "specifically address [the district court's] concerns about District 12," *id.*, while "hop[ing] to change as few districts as possible, to maintain the partisan balance of the State's congressional delegation, to keep incumbents in separate districts and preserve the cores of those districts, and to reduce the division of counties and cities, especially where the [district court] found the divisions were based on racial lines." *Id.* at 3a-4a.

The district court concluded that "the General Assembly successfully addressed the concerns noted by the [c]ourt in its Memorandum Opinion for the purposes of the instant Order," *id.* at 4a, and, "[t]hus, the 1998 plan includes a Twelfth Congressional District with fewer counties, fewer divided counties, a more 'regular' geographic shape, fewer divided towns, and higher dispersion and perimeter compactness measures." *Id.* The district court stated that "from the record now before [it]," *id.* at 3a, "race cannot be held to have been the predominant factor in redrawing District 12." *Id.* Referring to its earlier April 3, 1998 Order and April 14, 1998 decision, the district court noted that it was not ruling on the constitutionality of the revised District 1, and it directed the parties to proceed with discovery and trial accordingly. *Id.* at 5a. The district court specifically "reserve[d] jurisdiction" to reconsider its ruling regarding the constitutionality of District 12 of the 1998 Interim Remedial Plan "should new evidence emerge." *Id.*

SUMMARY OF ARGUMENT

In approving the 1998 North Carolina Congressional Redistricting Plan ("1998 Interim Remedial Plan") as a remedy for the constitutional violation it found in the 1997 plan, the court below acted in accord with this Court's long-standing,

well-settled precedents. Its decision was not clearly erroneous and should be affirmed, or in the alternative, this appeal should be dismissed.

First, Appellants argue that the district court erred in placing on them the burden of proving that race predominated in the creation of 1998 Interim Remedial Plan. However, despite raising a number of objections to the plan before the court below, Appellants failed to raise before the district court the issue of which party should bear the burden of proof at the remedial stage and, indeed, assumed the burden of proving that race predominated in the creation of the plan. As Appellants failed to raise the issue of what party should bear the burden of proof and neglected to object to the district court's assessment of burdens, the issue is not properly before this Court.

Nevertheless, even if Appellants have preserved this claim, it is insubstantial. It is well-settled that, in cases such as this, where plaintiffs challenge the constitutionality of a districting plan under the Fourteenth Amendment jurisprudence established by this Court in *Shaw v. Reno*, 509 U.S. 630 (1993) and *Miller v. Johnson*, 515 U.S. 900 (1995), the plaintiff bears the burden of proving that race predominated in the redistricting process. Moreover, consistent with this Court's precedents, this burden does not shift during the remedial phase of a challenge brought under the *Shaw* regime. Appellants offer no principled reasoning for abandoning this Court's holdings regarding burdens of proof in *Shaw* cases; instead they argue that shifting the burden would be consistent with the manner in which burdens are allocated in *de jure* school segregation cases. However, this analogy is tenuous, as school desegregation cases arise in a unique context that contrasts with the circumstances that attend redistricting cases and challenges brought under *Shaw* and its progeny. Since Appellants' theories conflict with this Court's regime for allocating burdens of proof in Fourteenth Amendment challenges such as this case, and

because Appellants demonstrate no meaningful rationale for altering that structure, Appellants' claim is insubstantial.

Second, Appellants cannot show that the court below erred in holding that race was not the predominant factor in the creation of the new Twelfth Congressional District in the 1998 Interim Remedial Plan. Appellants argue that the 1998 Interim Remedial Plan must be declared unconstitutional because it was the "fruit of the poisonous tree" of the 1992 and 1997 North Carolina reapportionment plans. Appellants contend that, in remedying the found *Shaw* violation, the State was required to abandon every feature of the challenged plan and construct a new plan without regard to its traditional districting concerns, including maintaining partisan balances and protecting incumbents. Appellants' theory is fundamentally at odds with this Court's precedents, finding no support in *Shaw* or its progeny or in the case law defining how courts evaluate remedial redistricting plans. According to these precedents, to the extent that the 1998 Interim Remedial Plan did not violate any federal or state constitutional or statutory requirements, the district court was bound to approve the plan. Appellants cannot show that this decision was clearly erroneous.

ARGUMENT

I. Appellants' Burden of Proof Argument does not warrant this Court's Review

A. Appellants failed to raise their burden of proof claim before the three-judge district court and have, therefore, waived it

Appellants claim that the State "should bear the burden to establish that race was *not* the predominant motive; and the burden should not have been placed on the plaintiffs to establish that race still predominated in drawing District 12." Appellants' Jurisdictional Statement ("Appellants J.S.") at 16 (emphasis in the original). Appellants' jurisdictional statement details all of

their objections to the 1998 Interim Remedial Plan that were presented to the court below. Appellants J.S. at 5, 11-15. However, Appellants never raised before the district court the issue of which party should bear the burden of proof at the remedial stage. In fact, Appellants assumed the burden of proving that race predominated in the creation of the plan, making arguments, similar to the ones raised here, that the State failed to remove from the plan the "vestiges" of the prior discrimination and that the plan is the "fruit of the poisonous tree" of the 1992 Plan and the 1997 Remedial Plan. Significantly, Appellants did not bring to the attention of the court below, for example by filing a motion pursuant to Fed. R. Civ. P. 59 to alter or amend the judgment, their contention that the burden of proof had been misallocated. Since Appellants failed to raise the issue of what party should bear the burden of proof and neglected to object to the district court's assessment of burdens, the issue is not properly before this Court. *See, e.g., Davis v. United States*, 495 U.S. 472, 489 (1990); *Breininger v. Sheet Metal Workers*, 493 U.S. 67, 94 n.18 (1989); *Solorio v. United States*, 483 U.S. 435, 451 n.18 (1987); *Berkemer v. McCarty*, 468 U.S. 420, 443 (1984); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981).

B. Even if Appellants have preserved the issue, their claim is insubstantial

Appellants claim that the district court erred in placing on them the burden of proving that race predominated in the creation of the 1998 Interim Remedial Plan.[6] However, it is well-settled that where plaintiffs challenge the constitutionality of a districting plan under the Fourteenth Amendment jurisprudence established by this Court in *Shaw v. Reno* and

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[6] In making this argument, Appellants attempt to draw analogies to criminal and school desegregation cases. As discussed below, these comparisons are inappropriate.

Miller v. Johnson, "[t]he plaintiff bears the burden of proving the race-based motive. . . ." *Shaw v. Hunt*, 517 U.S. 899, 905 (citation omitted). *See also Miller v. Johnson*, 515 U.S. 900, 916 (1995).

This burden does not shift during the remedial phase of such a challenge. In *Scott v. United States*, 920 F. Supp. 1248 (M.D. Fla. 1996), *aff'd sub nom. Lawyer v. Department of Justice*, 521 U.S. 567 (1997), a three-judge District Court for the Middle District of Florida considered a redistricting plan offered as a settlement of a lawsuit challenging, under *Shaw*, the constitutionality of Florida's Senate District 21. The district court received and considered objections to the proposed remedial plan by one of the named plaintiffs, *id.* at 1255, and, "in accord with *Miller*," evaluated the facts involving whether race predominated in the creation of the plan:

> 'The plaintiff's burden is to show . . . that race was the predominant factor motivating the legisiature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations.'

Scott, 920 F. Supp. at 1253 (quoting *Miller*, 515 U.S. at 916). In its affirmance of the decision, this Court did not disturb the trial court's allocation of the burdens. *Lawyer v. Department of Justice*, 521 U.S. 567 (1997).

Appellants offer no principled rationale for abandoning this Court's holdings regarding burdens of proof in the remedial phase of these cases. Appellants offer only a single ground for shifting the burden of persuasion: that such a shift "is a logical corollary of the principle that 'vestiges' of the unconstitutional plan should be eliminated,"Appellants J.S. at 16, a principle that Appellants urge this Court to adopt on this appeal (and to which

we respond *infra*).[7] This overlooks the facts that *de jure* school segregation was nearly always a pervasive, *systemwide* policy[8] with tangible, long-lasting effects[9] upon every aspect of the operations of the educational enterprise,[10] and that this Court

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[7]Appellants also suggest that shifting the burden of persuasion is supported by decisions of this Court in criminal cases, in which "the burden of proof *seems* to have been placed on the prosecutor to demonstrate that the 'taint' arising out of an illegal arrest in violation of the Fourth Amendment had been eliminated prior to obtaining a confession" (Appellants J.S. at 16-17 n.18 (emphasis added)). Appellants' hesitation in interpreting these decisions as embodying a special burden-shifting rule for "fruit of the poisonous tree" situations is well-advised, because they in fact apply only the ordinary principle that the party seeking to introduce evidence is required to establish its admissibility. Indeed, this Court noted in *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984), that although the prosecution must prove guilt beyond a reasonable doubt, "admissibility [is determined] by a preponderance of the evidence."

[8]*See Columbus Board of Education v. Penick*, 443 U.S. 449, 457-58 (1979) ("Proof of purposeful and effective maintenance of a body of separate black schools in a substantial part of the system itself is *prima facie* proof of a dual school system and supports a finding to this effect absent sufficient contrary proof by the [School] Board"); *Keyes v. School District No. 1, Denver*, 413 U.S. 189, 201, 213 (1979) (same); *id.* at 208, 210, 213 (finding of intentionally segregative school board actions in meaningful portion of school system creates presumption that other segregation in system is not adventitous and shifts burden to school authorities to prove that other segregated schools are not the result of their segregative actions).

[9]*See, e.g., Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 21 (1971) (school construction practices by segregated systems "may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races").

[10]*See Board of Education v. Dowell*, 498 U.S. 237, 250 (1991) ("In considering whether the vestiges of *de jure* segregation had been eliminated as far as practicable, the District Court should look not only at

placed an affirmative duty to extirpate all vestiges of the *de jure* policy upon school districts only after a long period of recalcitrant refusals to comply with the constitutional command of *Brown v. Board of Education*, 347 U.S. 483 (1954).[11]

Neither circumstance is present in this case. First, constitutional or statutory violations are often limited to only certain districts in an overall apportionment plan.[12] Thus, the entire political process has not been distorted in the manner or to the degree that public educational systems were in the *de jure* school desegregation context. Second, the "analytically distinct" cause of action upon which Appellants' lawsuit is based was announced by this Court a little more than five years ago, in *Shaw v. Reno*, 509 U.S. 630 (1993).

Because Appellants' theories conflict with this Court's carefully constructed regime for allocating burdens of proof in Fourteenth Amendment challenges that allege racial predominance in the redistricting process, and because Appellants advance no meaningful justification for modifying that structure, Appellants' claim is insubstantial.

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student assignments, but 'to every facet of school operations'"), *citing Green v. County School Board of New Kent County*, 391 U.S. 430 (1968).

[11] *See Swann*, 402 U.S. at 13-14 (referring to dilatory tactics and resistance to *Brown*); *Green*, 391 U.S. at 438 (holding 14 years after *Brown* that "[t]his deliberate perpetuation of the unconstitutional dual system [after *Brown*] can only have compounded the harm of such a system. Such delays are no longer tolerable"); *Id.* at 439 (school boards have burden of establishing that their plans will work "now").

[12] *E.g.*, *Vera v. Richards*, 861 F. Supp. 1304, 1345 (S.D. Tex. 1994), *aff'd sub nom. Bush v. Vera*, 517 U.S. 952 (1996) (sustaining plaintiffs' *Shaw v. Reno* challenge to only 3 of 24 questioned districts); *Thornburg v. Gingles*, 478 U.S. 30, 80 (1984) (affirming minority vote dilution findings of trial court with respect to some, but not all, districts in apportionment plan).

II. Appellants cannot demonstrate that the District Court's Factual Finding that Race did not Predominate in the Creation of the 1998 Interim Remedial Plan was Clearly Erroneous

Appellants obviously disagree with the factual finding of the court below, based upon the evidence before it,[13] that racial considerations did not predominate in the North Carolina General Assembly's construction of the 1998 Interim Remedial Plan. Because they are unable to show that the lower court's finding on this record is "clearly erroneous," *see* Fed. R. Civ. P. 52(a); *Thornburg v. Gingles*, 478 U.S. at 78, Appellants strain in their Jurisdictional Statement to identify some presumed legal error in the application of this Court's precedents. This effort is unavailing, and the Court should either affirm the judgment below or dismiss the appeal for want of any substantial question.

First, Appellants assert that this case is similar to a school desegregation case and that the district court erred by not "assuring that the 'vestiges' of the unconstitutional 1992 and 1997 racial gerrymanders were eliminated." Appellants J.S. at 7. Second, drawing an analogy between the 1998 redistricting process and the use against criminal defendants of evidence which was illegally obtained, Appellants argue that the court below should have ruled that the 1998 Interim Remedial Plan is the "fruit of the poisonous tree" of the 1992 and 1997 redistricting plans held to be unconstitutional. Appellants J.S. at 9. Finally, citing *Village of Arlington Heights v. Metropolitan Dev. Corp.*, 429 U.S. 252, 265-66 (1977), Appellants contend that the trial court erred by adhering to the standard announced by this Court in *Shaw*, and "requiring that

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[13]The district court explicitly "reserved jurisdiction with regard to the constitutionality of District 1 under this plan and as to District 12 should new evidence emerge." Appellants J.S. App. at 5a.

plaintiffs in these 'analytically distinct' actions must demonstrate that race was the predominant motive for creating" a challenged district. Appellants J.S. at 10. Appellants instead argue in favor of a rule that would condemn *any* consideration of race in shaping a remedial plan. *Id.*[14]

Appellants' arguments in support of reversal rely primarily upon two grounds: 1) as viewed by the Appellants, the Twelfth District in the 1998 Interim Remedial Plan is not "geographically compact"; and 2) the plan protected all of the State's congressional incumbents and should be deemed constitutionally invalid because it extended such protection to the African American incumbent of District 12, as well as to white incumbents. Neither of these factors constitutes proof of unconstitutionality under this Court's existing precedents and they are, therefore, insufficient to meet the rigorous standard of proof required by this Court.

In cases raising claims such as the ones raised by Appellants here, this Court has already defined an *analytically distinct* regime for determining whether a redistricting plan violates the Constitution. As pointed out above, Appellants' burden in this case was to show that "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines" in the 1998 Interim Remedial Plan, *Bush v. Vera*, 517 U.S. at 951, *quoting Miller v. Johnson*, 515 U.S. at 913, and "that other, legitimate districting principles were 'subordinated' to race." *Bush*, 517 U.S. at 958. *See generally id.* at 259-68. It is insufficient for Appellants to show, as they attempted to do here, merely that

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[14]Appellants state that only if courts apply what they describe as the *Arlington Heights* test "can a district court be assured that the 'taint' of an earlier racial gerrymander has been eliminated," Appellants J.S. at 11, suggesting that this argument is a subpart of their "fruit of the poisonous tree" contention.

inclusion of African-American voters was one factor influencing the contours of a district in the plan adopted by the legislature – or even that the entire districting process was carried out "with consciousness of race," *Bush*, 517 U.S. at 1051. As Justice O'Connor has observed:

> States may intentionally create majority-minority districts and may otherwise take race into consideration, without coming under strict scrutiny. Only if traditional districting criteria are neglected, *and* that neglect is predominantly due to the misuse of race, does strict scrutiny apply.

Bush, 517 U.S. at 993 (O'Connor, J., concurring) (emphasis in original); *see also United States v. Hays*, 515 U.S. 737, 745 (1995) ("We recognized in *Shaw* . . . that the 'legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination'") (citation omitted) (emphasis in original). *See also* Smallwood Appellees' Brief of Appellant-Intervenors in *Hunt v. Cromartie*, No. 98-85 at 32-37[15]

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[15]Moreover, legislative consideration of a non-racial factor that is *correlated* with race is insufficient to demonstrate predominance unless the court finds that it was a proxy for race. *Bush v. Vera*, 517 U.S. at 967-69. This principle demonstrates the tenuousness of Appellants' reliance upon the General Assembly's interest in protecting incumbents as an indication of the 1998 Interim Remedial Plan's constitutional infirmity based solely on the fact that North Carolina's Twelfth District Representative is African American. It is undisputed that the State sought to protect *all* incumbent members of its congressional delegation, white *and* African American; since ten of twelve members of that delegation were white, incumbency protection – which Appellants acknowledge is an appropriate legislative purpose "in the first instance," Appellants J.S. at 14 – hardly suggests that racial motives were predominant. By arguing that it was *per se* unconstitutional for the

This Court's recognition that legislatures are always aware of race in drawing district lines, and its consequent holding that legislatures may permissibly take race into consideration in that process so long as racial considerations do not predominate, carves out a limited role for federal courts in the redistricting process of States that is effective without being overly intrusive. *See Miller v. Johnson*, 515 U.S. at 915-17. The Court has refused to alter that role when a legislative plan adopted to remedy an earlier constitutionally infirm apportionment is at issue, *see Lawyer v. Department of Justice*, discussed *supra* at p. 9. Appellants have presented no convincing reason why this Court should adopt the standard they describe as the "*Arlington Heights* rule," which would bar *any* consideration of race by a legislature enacting a remedial plan. That standard would make vastly more intrusive the scope of federal courts' inquiries into districting processes, but as we show below, neither of Appellants' other arguments (the "fruit of the poisonous tree" and duty to eradicate all "vestiges" arguments) states an adequate justification for replacing the controlling decision of this Court with the Appellants' untested theories.

Appellants' "fruit of the poisonous tree" argument is not persuasive, since States are not required to discard completely

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State to protect the incumbency of the Twelfth District's African-American Congressman to the same extent as it protected other incumbents, *id.*, Appellants urge the adoption of a double standard that is intolerable under the decisions of this Court. *See, e.g., Miller v. Johnson*, 515 U.S. at 928 (O'Connor, J., concurring); *Shaw v. Hunt*, 517 U.S. at 996 (Kennedy, J., concurring). Congressman Melvin Watt was recently re-elected as the representative of the redrawn Twelfth District which is *now 65% white* in population, but Appellants nevertheless persist in arguing that the district (and a fortiori, Congressman Watt's electoral success) is the product of a racial gerrymander. There is no legal or factual basis for suggesting that such a district is constitutionally invalid.

the original challenged plan before developing a new remedial redistricting plan.[16] This argument finds no support in *Shaw*, its progeny, or in cases which define how remedies must be fashioned in voting rights cases. This Court has consistently accorded great deference to the States' policy choices in the redistricting process and has repeatedly held that the redistricting policy choices of the State should be set aside by a federal court only to the extent necessary to remedy a violation of federal law. *See, e.g., White v. Weiser*, 412 U.S. 783, 795 (1973) (in devising a remedy for a federal constitutional violation, a court "should follow the policies and preferences of the State, expressed in statutory and constitutional provisions or in reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitutions"); *see also Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) ("[F]ederal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements"). It is not enough for litigants or the federal courts to simply prefer a different redistricting outcome; rather, the State's choices may be subverted only to the extent necessary to remedy the violation. As the district court reasoned, where, as in this case, the State has enacted a new plan that fully remedies the *Shaw* violation and complies with all applicable federal and state constitutional and statutory

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[16]That there is some resemblance between district shapes in a challenged plan and those in a remedial plan is not a sufficient basis for invalidating the latter *unless the court finds that racial considerations again predominated in its construction*, for otherwise a legislature would be required to abandon its earlier plan and its incumbent officials completely. Neither the inclusion of areas smaller than whole counties in the 1998 Interim Remedial Plan, nor the re-election of its prior incumbent under that Plan, *see supra* note 15, may properly be characterized as the "fruit" of any "poisonous tree" that compels its proscription.

provisions, there is no basis for federal judicial interference with its implementation. *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978); *see also Shaw v. Hunt*, 517 U.S. at 917 n.9 ("states retain broad discretion in drawing districts to comply with the mandate of § 2") (citing *Voinovich v. Quilter*, 507 U.S. 146 (1993) and *Growe v. Emison*, 507 U.S. 25 (1993)); *Burns v. Richardson*, 384 U.S. 73, 85 (1966) ("A State's freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause"). *See also* Smallwood Appellees' Brief of Appellant-Intervenors in *Hunt v. Cromartie*, No. 98-85 at 28-31.

Appellants' analogy to school desegregation jurisprudence fares no better. First, as noted earlier,[17] unlike the system-wide findings of *de jure* discrimination in the typical school desegregation case, findings of statutory or constitutional violations in apportionment plans often involve only a limited number of districts rather than the entire plan. There is thus no reason to search for "vestiges" of racial predominance outside the specific electoral districts held to be invalid. Second, Appellants themselves fail to indicate what such "vestiges" might be, other than the same features they have characterized as the "fruit of the poisonous tree" in their effort to change the identity of the Twelfth District Representative, *see supra* note 15. Finally, the school desegregation cases in fact support the result below.

In the school desegregation context, this Court has "articulated a three-part framework . . . to guide district courts in the exercise of their remedial authority." *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995). As this Court stated in *Milliken v. Bradley*, 433 U.S. 267 (1977),

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[17] *See supra* page 11 n.12 and accompanying text.

> In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. . . . The remedy must therefore be related to 'the *condition* alleged to offend the Constitution. . . .' Second, the decree must indeed be *remedial* in nature, that is, it must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.

Id. at 280-81 (footnotes and citations omitted). In *Freeman v. Pitts*, 503 U.S. 467 (1992), this Court concluded that this inquiry should focus upon "'whether the [constitutional violator] ha[s] *complied in good faith* with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated *to the extent practicable*.'" *Id.* at 492 (quoting *Board of Education v. Dowell*, 498 U.S. at 249-50 (emphasis added). Indeed, "[t]he task is to correct, *by a balancing of the individual and collective interests*, the condition that offends the Constitution." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 15-16 (emphasis added).

Far from calling into question the decision below, this Court's standard for analyzing school desegregation plans establishes a role for federal courts that is entirely consistent with a federal court's duty in evaluating remedial redistricting plans and comports with the process the district court in this case followed in reviewing the 1998 Interim Remedial Plan. Appellants complain that "*nothing* in the opinion of the court below reflects *any* awareness on its part of its responsibility to assure that 'vestiges' of the racially-gerrymandered 1992 plan

were not still present in the 1998 plan," Appellants J.S. at 11 (footnote omitted and emphasis added). However, predicated upon this Court's precedents discussed above, the district court did in fact engage in a careful balancing of the State's responsibilities to remedy the constitutional violation found, while fulfilling its other legitimate political redistricting objectives.[18] The court found that the State's primary redistricting goal was to create a plan to "address [the court's] concerns about District 12." Appellants J.S. App. at 3a. In

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[18]To illustrate the over-breadth of Appellants' position, we note that they argue, even though no court has ever held that the First Congressional District in either the 1992 Plan or the 1997 Remedial Plan unconstitutional, that the district court was nevertheless obligated to "assure that the First District as it exists in the [1998 Interim Remedial Plan] has none of the 'vestiges' of the earlier First District and is not the 'fruit' of that poisonous tree." Appellants J.S. at 11 n8. However, once it found a discrete constitutional violation, the district court was bound by this Court's precedents to tailor the nature and scope of the remedy to match the nature and scope of the violation. *See, e.g., Milliken*, 433 U.S. at 281-82 (the "principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation. . . ."); *Lewis v. Casey*, 518 U.S. 343, 357 (1995) ("The remedy must of course be limited to the inadequacy that produced the injury-in-fact that the plaintiff has established") (citation omitted). Since the court only found that the Twelfth District violated the Constitution, and the First District has never been held to violate the Constitution, the district court properly limited its evaluation of the 1998 Remedial Plan: "Because this [c]ourt held only that District 12 in the 1997 plan unconstitutionally used race as the predominant factor in drawing District 12, the [c]ourt is now limited to deciding whether race was the predominant factor in the redrawing of District 12 in the 1998 plan." Appellants J.S. App. at 3a. Appellants are not entitled to a remedy for a non-existent constitutional violation and, to date, no court has found a *Shaw* violation in the First Congressional District.

addition, it found that the State sought to "maintain the partisan balance of the State's congressional delegation, to keep incumbents in separate districts and preserve the cores of those districts, and to reduce the division of counties and cities. . . ." *Id.* at 3a, 4a. The court concluded that the State struck a balance that resulted in a plan that "successfully addressed the concerns of [the court]" *Id.* Therefore, despite Appellants' claims to the contrary, the district court was aware of its responsibilities in reviewing the 1998 Interim Remedial Plan and acted in accord with this Court's long-standing precedents. Offering no principled rationale for this Court to abandon its well-settled standards governing the delicate role of federal courts in the redistricting process, Appellants' appeal is insubstantial.

The district court order on appeal was firmly grounded in this Court's precedents. If plenary review is routinely granted by this Court based upon the claims Appellants raise here, this Court will be forced to evaluate and review the details of congressional or state legislative districts whenever a plaintiff alleges that they have an odd shape or that race was even a trivial consideration in their creation. The district court properly disposed of the issues before it and Appellants have presented nothing to demonstrate that the court's action was contrary to law or that its factual findings were clearly erroneous.

CONCLUSION

For the foregoing reasons, the motion to affirm or, in the alternative, dismiss should be granted.

Respectfully submitted,

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